

DEPARTMENT OF STATE REVENUE
LETTER OF FINDINGS NUMBER: 01—0292
Gross Retail and Use Tax—Adequate Documentation
Tax Administration—Penalty
For Tax Years 1998-1999

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ISSUES

I. Gross Retail and Use Tax—Adequate Documentation

Authority: IC § 6-8.1-5-1 45 IAC 15-5-4

Taxpayer protests the proposed assessments of Indiana's gross retail and use taxes.

II. Tax Administration—Penalty

Authority: IC § 6-8.1-10-2.1 45 IAC 15-11-2

Taxpayer protests the proposed assessment of the negligence penalty.

STATEMENT OF FACTS

Taxpayer sells used medical equipment, primarily ultra sound machines. In August of 2000, the Audit Division notified taxpayer he had been selected for auditing and that certain records should be available to complete the audit in a timely fashion. *See*, discussion, *infra*. Because taxpayer and his representative were uncooperative in providing the required documentation, the Audit Division assessed gross retail and use tax based on the best information available to the auditor. Taxpayer and his representative then filed a protest, claiming the documents were then available; taxpayer and his representative then cancelled two meetings with the auditor. The file came to the Legal Division for resolution. Thereafter, the auditor was able to examine documentation made available pursuant to an agreement between the Department and taxpayer's representative.

Taxpayer protests the proposed assessment of Indiana's gross retail and use taxes based on the best information available to the auditor at the time of the audit. Because there was little information available at the time of the original audit, a projection was used to determine gross retail tax liability for 1998. The auditor also assessed use tax on a variety of expense item purchases, using a projection for 1999 because of the same lack of available information. Finally, the 10% negligence penalty was imposed. The auditor returned to taxpayer's

representative's office to examine thoroughly additional documentation made available after a protest hearing was held. The auditor was unable to determine taxpayer's liability based on the new documentation and again relied on the projections used in the original audit exam, concluding the review in December of 2002. Additional facts will be added as necessary.

I. Gross Retail and Use Tax—Adequate Documentation

DISCUSSION

Taxpayer protests the proposed assessments of Indiana's gross retail and use taxes. Because of taxpayer's and his representative's reluctance to timely provide the proper documents to the auditor, and their continuing failure to cooperate with the Department, a hearing was set before one of the Legal Division's Hearing Officers. At the hearing, taxpayer's representative stated that records for tax year 1998 were now ready for inspection. Since the proposed assessment for 1998 was based on a projection backward from tax year 1999, the availability of 1998's records would have presented a more accurate basis for a proposed assessment. Therefore, a supplemental audit was performed pursuant to IC § 6-8.1-5-1 and 45 IAC 15-5-4. However, the auditor, after thoroughly reviewing the new documentation, determined that there were numerous invoices that were needed, but not provided, for his inspection. Further, there were numerous problems with the documents actually provided. In short, taxpayer, after being given numerous opportunities to provide appropriately reliable documentation in support of his protest, failed to provide what was needed in order to refute the Department's projection method.

As just one example from the many listed in the auditor's supplemental examination memorandum, the auditor noted that taxpayer should have been able to provide a 1998 Sales Journal "clearly showing Indiana and non-Indiana sales" and 1998 Sales invoices with "ship to" information on it. Instead, taxpayer only provided "deal jackets" for 1998, some of which were sequentially missing and showed no Indiana buyers. Taxpayer's income tax return did not have any apportionment, and all sales were shown as Indiana sales.

FINDING

Taxpayer's protest concerning the proposed assessments of Indiana's gross retail and use taxes is denied.

II. Tax Administration—Penalty

DISCUSSION

Taxpayer protests the imposition of the 10% negligence penalty. Taxpayer argues that it had reasonable cause for failing to pay the appropriate amount of tax due. Taxpayer's representative stated at the hearing that there was no intent to defraud the state, and that taxpayer's failure to pay the proper amount of tax was due to faulty corporate financial structuring and failure to keep proper records in a form and place readily accessible.

Indiana Code Section 6-8.1-10-2.1(d) states that if a taxpayer subject to the negligence penalty imposed under this section can show that the failure to file a return, pay the full amount of tax

shown on the person's return, timely remit taxes held in trust, or pay the deficiency determined by the department was due to reasonable cause and not due to willful neglect, the department shall waive the penalty. Indiana Administrative Code, Title 45, Rule 15, section 11-2 defines negligence as the failure to use reasonable care, caution, or diligence as would be expected of an ordinary reasonable taxpayer. Negligence results from a taxpayer's carelessness, thoughtlessness, disregard or inattention to duties placed upon the taxpayer by Indiana's tax statutes and administrative regulations.

In order for the Department to waive the negligence penalty, taxpayer must prove that its failure to pay the full amount of tax due was due to reasonable cause. Taxpayer may establish reasonable cause by "demonstrat[ing] that it exercised ordinary business care and prudence in carrying or failing to carry out a duty giving rise to the penalty imposed. . . ." In determining whether reasonable cause existed, the Department may consider the nature of the tax involved, previous judicial precedents, previous department instructions, and previous audits.

Taxpayer has failed to set forth a basis whereby the Department could conclude taxpayer exercised the degree of care statutorily imposed upon an ordinarily reasonable taxpayer. It is undisputed that taxpayer failed to keep proper records. Given the totality of the circumstances, waiver of the penalty is inappropriate in this instance because taxpayer was negligent in keeping proper corporate records of its business transactions.

FINDING

Taxpayer's protest concerning the proposed assessment of the 10% negligence penalty is denied.